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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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May 8, 2015

The Honorable Tom Wheeler
Chairman, Federal Communications Commission
445 12th St SW
Washington, DC 20536

Dear Chairman Wheeler:

As a co-author of the STELA Reauthorization Act (STELAR), I am writing to you about the scope of the Federal Communications Commission's (FCC) effort to implement section 111 of the Act. On March 16, the FCC adopted a Notice of Proposed Rulemaking (NPRM) proposing to reverse the longstanding presumption that cable operators are not subject to effective competition and must establish that they are in a competitive market before receiving relief from certain regulations. Section 111 of STELAR directed the FCC to take steps to streamline the process for small cable operators to file effective competition petitions, but the FCC's current rulemaking proposal appears to do much more. I strongly encourage you to separate the broader question of whether to reverse the effective competition presumption for all cable operators from the narrow directive Congress gave you to provide small operators with some relief.

Section 111 was purposefully focused on small cable operators, particularly those in rural areas. In places like Vermont, small operators offer consumers a valuable service and are often a key provider of broadband access. There is no doubt that small, rural providers face a number of challenges. Rather than enacting wholesale changes to the regulatory regime governing all cable companies, Congress instead focused in STELAR on leveling the playing field so that small operators can utilize the same administrative procedures that are readily accessible to larger ones. The FCC should take this directive at face value.

STELAR was the bipartisan product of careful negotiation between the Senate and House, particularly on important questions of how to enact reforms to the video marketplace. The Act reflects compromise between Democrats and Republicans, as well as with stakeholders ranging from small cable operators to large content producers. We provided the FCC with deadlines to adopt the reforms that were enacted to ensure that they took effect in a timely manner. It is surprising to see our deadlines used to adopt sweeping changes to the marketplace that are much broader than what was contemplated by the Act.

While I have heard from stakeholders who have expressed serious concerns about the broad policy changes the FCC is proposing to adopt in the NPRM, I believe that discussion is best left to another proceeding or legislative action. If the FCC can act within its authority and build a record that supports making broader changes, it is within its rights to do so.

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I do not believe, however, that the STELAR implementation process and the Congressionally mandated deadlines therein represents the appropriate vehicle to make such changes. I encourage you to reconsider your current path and use the section 111 proceeding in the narrow way in which Congress intended. Thank you for your consideration of this matter.

Sincerely,

A handwritten signature in blue ink, reading "Patrick Leahy". The signature is fluid and cursive, with the first name "Patrick" and last name "Leahy" clearly distinguishable.

PATRICK LEAHY
Ranking Member



OFFICE OF
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

June 3, 2015

The Honorable Patrick J. Leahy
Ranking Member
Committee on Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Leahy:

Thank you for your letter regarding the scope of the Commission's proposal for implementing Section 111 of the STELA Reauthorization Act of 2014 (STELAR).

As you know, Congress established the test for Effective Competition currently implemented by the Commission in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). The statutory test for the type of Effective Competition at issue in the proposed Order is satisfied if the franchise area is "(i) served by at least two unaffiliated [MVPDs] each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by [MVPDs] other than the largest [MVPD] exceeds 15 percent of the households in the franchise area."¹ When the Commission adopted the presumption of no Effective Competition in 1993, incumbent cable operators had approximately a 95 percent market share of MVPD subscribers.

Today, the nationwide presence of DIRECTV (provides local broadcast channels to 197 markets representing over 99 percent of U.S. homes) and DISH Network (provides local broadcast channels to all 210 markets), alongside the significant number of direct broadcast satellite (DBS) subscribers (34.2 million or 33.9 percent of MVPD subscribers)², result in approval of Effective Competition petitions in almost every instance. As such, the FCC has granted Effective Competition petitions in over 10,000 communities thus far and has found that Effective Competition exists in more than 99.5 percent of the communities evaluated since 2013.

The proposal currently before the Commission adopts a rebuttable presumption of Competing Provider Effective Competition. Thus, while it provides the administrative relief detailed in Section 111 of STELAR, as demonstrated by the support it has received from small cable operators,³ it also preserves the ability of local franchising authorities to provide data that

¹ 47 U.S.C. § 543(l)(1). This type of Effective Competition is known as Competing Provider Effective Competition. The other three types of Effective Competition defined in the statute are Low Penetration Effective Competition, Municipal Provider Effective Competition, and Local Exchange Carrier (LEC) Effective Competition. Only a presumption of Competing Provider Effective Competition is at issue in this proceeding.

² *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd 3253, 3256, ¶ 2, and 3300-01, ¶¶ 112-113 (2015).

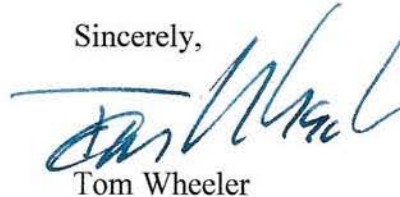
³ See Comments and Reply Comments of the American Cable Association.

refutes the presumption if able. Vermont exemplifies the prevalence of Effective Competition as defined in the statutory tests. To date, all of the 17 Effective Competition petitions received for Vermont, covering 191 communities, satisfy the Congressional standard. As a result, Effective Competition has been declared in 75 percent of the communities in Vermont, including more populated areas, such as Burlington and small towns like Bellows Falls and Bradford.⁴

The current record, as well as the results of the vast majority of Effective Competition petitions to date for the last decade, support the proposal being considered by the Commission. Aligning the Commission's administrative processes with the success of Congress's push for more MVPD providers as defined in the 1992 Act would not undermine our shared goals of greater broadband access in rural areas and more consumer choice in the video marketplace. In fact, updating our policies will allow staff resources to be dedicated to ongoing initiatives that would have a more direct impact on these objectives.

I appreciate your interest in this matter, and your views will be included in the record of the proceeding for the Commission's review. Please let me know if I can be of any further assistance.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tom Wheeler", is written over a horizontal line.

Tom Wheeler

⁴ This data is based on a staff determination that out of a total of 254 Community Unit Identification Numbers (CUIDs) in Vermont, the Commission has granted a finding of Effective Competition in 191 communities.